

United States District Court
Central District of California

FIRPO WYCOFF CARR,
Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION et al.,
Defendants.

Case № 2:23-cv-01813-ODW (MAAx)

**ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS [14]**

I. INTRODUCTION

Plaintiff Firpo Wycoff Carr brings this action against the Federal Bureau of Investigation and the United States Department of Justice for grand theft of personal property, violation of civil rights, and stalking. (Compl. ¶¶ 61–66, ECF. No. 1.) Defendants now move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1) and Rule 12(b)(6). (Defs.’ Mot. Dismiss (“Motion” or “Mot.”), ECF No. 14.) The Court carefully considered the papers filed in connection with the Motion and deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court **GRANTS** Defendants’ Motion.

II. BACKGROUND

Because Defendants base their Rule 12(b)(1) challenge entirely on Carr’s allegations without submitting their own evidence, Defendants’ jurisdictional challenge is properly characterized as a “facial attack.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Accordingly, for the purpose of the Rule 12(b)(1) analysis, the Court “[a]ccept[s] the plaintiff’s allegations as true and draw[s] all reasonable inferences in the plaintiff’s favor.” *Id.* (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). The Court does the same for the purpose of the Rule 12(b)(6) analysis. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

As alleged in the Complaint, Carr has been under FBI surveillance since January 1989. (Compl. ¶ 60.) Since that time, the FBI has terrorized him, stalked him in fast cars with illegally tinted front windshields, used specially modified bright headlights as weapons to cause him temporary blindness, and enlisted its Cyber Ops to gain control of his Facebook and Gmail accounts. (*Id.*) Further, the FBI has bugged Carr’s cell phones, stolen from his ancient coin collection, and vandalized his office at a storage facility. (*Id.*)

More recently, on November 26, 2022, Carr was working at a table at a Panera Bread restaurant when he stepped away from his table to obtain takeout from another nearby restaurant. (*Id.* ¶¶ 6, 8.) At that point, an FBI agent disguised as a person experiencing homelessness used a skateboard to approach and steal Carr’s unattended laptop, tablet, phone, headphones, and satchel. (*Id.*) The FBI obtained his passwords from the hard drives of the stolen property and deleted files, pictures, PowerPoint slides, and video presentations from his cloud storage. (*Id.* ¶ 24.)

On March 10, 2023, Carr filed his Complaint, setting forth causes of action for (1) larceny and grand theft of personal property pursuant to 10 U.S.C. § 921 and California Penal Code section 487; (2) violation of civil rights and conspiracy against rights pursuant to 18 U.S.C. § 241 and California Penal Code section 182; and (3) stalking pursuant to 18 U.S.C. § 2261A. (*Id.* ¶¶ 61–66.) Defendants now move to

1 dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to
 2 state a claim pursuant to Rule 12(b)(6). (Mot.) In response, Carr filed a “Response to
 3 Order to Show Cause” and a “Response to Motion to Dismiss; Violation of Local Rule
 4 7-3.” (Resp. Order Show Cause (“First Opp’n”), ECF No. 24; Resp. Mot. Violation
 5 Local Rule 7-3 (“Second Opp’n”), ECF No. 25.) The Court deemed these two
 6 documents, taken together, to be Plaintiff’s Opposition to Defendant’s Motion to
 7 Dismiss. (Min. Order Den. Second Req. Enter Default, ECF No. 27.) Defendants
 8 replied. (Reply, ECF No. 30.)

9 III. LEGAL STANDARD

10 As discussed below, the Court grants this Motion on Rule 12(b)(1) grounds
 11 without rendering any substantive ruling on Rule 12(b)(6) grounds. The legal
 12 standard for challenges brought under Rule 12(b)(1) is as follows.

13 “Federal courts are courts of limited jurisdiction. They possess only that power
 14 authorized by Constitution and statute” *Kokkonen v. Guardian Life Ins. Co. of*
 15 *Am.*, 511 U.S. 375, 377 (1994). Pursuant to Rule 12(b)(1), a party may move to
 16 dismiss a case based on a court’s lack of subject matter jurisdiction. *See* Fed. R. Civ.
 17 P. 12(b)(1).

18 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
 19 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack “accepts the
 20 truth of the plaintiff’s allegations but asserts that they are insufficient on their face to
 21 invoke federal jurisdiction.” *Leite*, 749 F.3d at 1121 (internal quotation marks
 22 omitted). Conversely, a factual attack “contests the truth of the plaintiff’s factual
 23 allegations, usually by introducing evidence outside the pleadings.” *Id.* The party
 24 attempting to invoke the court’s jurisdiction bears the burden of establishing
 25 jurisdiction. *See Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir.
 26 1995).

27 Where a district court grants a motion to dismiss, it should generally provide
 28 leave to amend unless it is clear the complaint could not be saved by any amendment.

1 See Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
 2 1031 (9th Cir. 2008). Leave to amend may be denied when “the court determines that
 3 the allegation of other facts consistent with the challenged pleading could not possibly
 4 cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
 5 1393, 1401 (9th Cir. 1986); *Carrico v. City and Cty. of San Francisco*, 656 F.3d 1002,
 6 1008 (9th Cir. 2011) (“[Leave to amend] is properly denied . . . if amendment would
 7 be futile.”).

8 IV. DISCUSSION

9 Defendants argue that the court lacks subject matter jurisdiction and, in the
 10 alternative, that Carr fails to state a claim upon which relief can be granted. (Mot. 1.)
 11 In response, Carr argues that the Court should deny the Motion because Defendants
 12 failed to timely meet and confer with Carr as required by Local Rule 7-3. (See Second
 13 Opp’n.) Carr also presents a series of arguments regarding why this case should not
 14 be dismissed; it is not clear whether these arguments are raised in opposition to the
 15 Rule 12(b)(1) challenge or the Rule 12(b)(6) challenge. (See generally First Opp’n.)

16 A. Local Rule 7-3

17 First, Carr argues the Court should deny the Motion because the parties’ meet-
 18 and-confer took place “at least 6 days prior,” not “at least 7 days prior,” to the filing of
 19 the motion. (Second Opp’n 1 (emphasis omitted).) Central District of California
 20 Local Rule 7-3 requires counsel contemplating motion practice to “contact opposing
 21 counsel to discuss thoroughly, preferably in person, the substance of the contemplated
 22 motion and any potential resolution.” C.D. Cal. L.R. 7-3; see C.D. Cal. L.R. 1-3
 23 (confirming that the Local Rules apply when either side is unrepresented). The
 24 conference must take place at least seven days before the motion is filed. *Id.*

25 Here, Carr fails to show that a timely conference did not take place. The emails
 26 he attaches to his Opposition demonstrate that defense counsel first informed Carr of
 27 the bases for dismissal as early as April 25, 2023. (Second Opp’n Ex. 3 (“April 25
 28 Defense Email”) (discussing bases for dismissal and requesting real-time conference);

1 Ex. 2 (“April 28 Defense Email”) (confirming May 4 conference).^{1,2} To the extent
 2 Carr argues that the real-time conference was not timely, Carr fails to provide
 3 sufficient evidence for the Court to make this finding. Carr asks the Court to infer
 4 from emails whose purpose was to plan and confirm a meeting that a meeting indeed
 5 took place on a particular late date. Carr does not submit a declaration confirming that
 6 a meeting took place on any particular date, and Defendants do not concede the point.
 7 (*See* Reply 2.) Carr’s evidence is insufficient.

8 Moreover, and in any case, to the extent the conference took place six days
 9 before Defendants filed the Motion instead of seven, the Court waives the irregularity
 10 and proceeds to consider the Motion. C.D. Cal. L.R. 7-4 (providing courts with
 11 discretion in determining whether to decline to consider a motion for violating Local
 12 Rule 7-3).

13 **B. Subject Matter Jurisdiction**

14 Defendants argue that Carr’s allegations do not provide the Court with subject
 15 matter jurisdiction over the case. (Mot. 2–4.) For the following reasons, the Court
 16 agrees and dismisses the Complaint on this basis alone.

17 Here, Plaintiff alleges subject matter jurisdiction under 28 U.S.C. § 1331,
 18 (Compl. ¶ 1), which gives federal courts subject matter jurisdiction over “civil actions
 19 arising under the Constitution, laws, or treaties of the United States,” 28 U.S.C.
 20 § 1331. However, “federal courts are without power to entertain claims otherwise
 21 within their jurisdiction if they are ‘so attenuated and unsubstantial as to be absolutely
 22 devoid of merit.’” *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (quoting
 23 *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)); *see also* *Nietzke*
 24 *v. Williams*, 490 U.S. 319, 327 n.6 (1989). In other words, courts lack subject matter
 25 jurisdiction to consider claims that are “so insubstantial, implausible, foreclosed by
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27 ¹ The Exhibits attached to the Second Opposition are out of order; the Court uses the Exhibit
 28 numbers according to the page labels preceding each Exhibit in the filing itself.

² All Exhibits to the Second Opposition are found at ECF No. 25.

1 prior decisions . . . or otherwise completely devoid of merit as not to involve a federal
2 controversy.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (quoting
3 *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)); *see also*
4 *Patel v. Patel*, 473 F. App’x 589, 590 (9th Cir. 2012).

5 Here, Carr’s claims are so implausible and devoid of merit that they do not
6 involve a federal controversy. Fundamentally, Carr claims that the FBI stole his
7 property at a Panera Bread restaurant. (Compl. ¶¶ 6, 10.) The specific factual
8 allegation supporting this claim is that Carr stepped away from his belongings and a
9 “[w]hite male on a skateboard” stole those belongings. (*Id.* ¶ 8.) To state any claim
10 against Defendants arising from this series of events, Carr must plausibly connect the
11 theft to the FBI. But Carr’s allegations connecting the theft to the FBI are speculative,
12 implausible, and otherwise not well-pleaded.

13 As one example, Carr alleges that Sonya, the Panera Bread manager,
14 collaborated with the FBI to call away a server Carr asked to keep an eye on his
15 property while he stepped away. (*Id.* ¶¶ 9, 11.) Moreover, Carr alleges Sonya had the
16 “backing” of the FBI when she refused to provide a Los Angeles County Sheriff
17 deputy with the relevant surveillance footage. (*Id.* ¶ 11.) Carr alleges Sonya’s
18 “cavalier, smug, insensitive, and defiant” attitude toward Carr supports this
19 conclusion. (*Id.*) These allegations, the premises on which they are based, and the
20 inferences Carr draws from them regarding FBI involvement, are entirely implausible
21 and devoid of merit.

22 As another example, Carr cites an email exchange between himself and a
23 surgeon named Dr. Nakayama, in which he believes that someone spoofed or took
24 over Dr. Nakayama’s email. (*Id.* ¶¶ 18–19.) Carr alleges that Dr. Nakayama’s email
25 signature included a “photoshopped” or “deep fake” photo attempting to “paint
26 Dr. Nakayama as a Communist Chinese military official” and thus implicate Carr by
27 association. (*Id.*) Carr then concludes that the alterations to Dr. Nakayama’s
28 photograph must be the work of the FBI because a “random homeless man” would not

1 be capable of such a “sophisticated stratagem.” (*Id.* ¶ 19.) Again, the inferences Carr
2 draws regarding the connection between these facts and the FBI are wholly untenable,
3 speculative, and without merit. The Court also notes that, other than the fact that this
4 series of events took place a few weeks after the Panera incident, the connection
5 between the Nakayama email incident and the Panera incident is entirely unclear.

6 As a third example, Carr describes an experience in which two purported FBI
7 agents approached him at a gas station to ask for gas money. (*Id.* ¶ 37.) The only
8 thing about the encounter suggesting that the two individuals were related to the FBI
9 is the fact that, as a thank-you, they offered him jewelry for his “wife or girlfriend.”
10 (*Id.*) Carr speculates that only FBI agents would have known he had a wife or
11 girlfriend, and that he was not, for example, gay. (*Id.*) The alleged connection to the
12 FBI is illogical, untenable, and wholly without merit.

13 Other purported connections to the FBI are based on everyday occurrences with
14 natural, obvious explanations. (*See, e.g.*, Compl. ¶ 56 (attributing encounters with
15 cars with high-beam lights and tinted windows to the FBI); ¶ 48 (blaming local law
16 enforcement inaction on a conspiracy “inspired” by the FBI).) In all, Carr relies on a
17 combination of implausible inferences, logical fallacies, and speculation to fashion a
18 connection between the events he experienced and the FBI. Carr’s allegations fail to
19 establish a minimally plausible connection between the Panera incident and the FBI.

20 In light of the lack of this connection, Carr’s claims are so devoid of merit as to
21 be wholly unsubstantial. As a result, the Court lacks subject matter jurisdiction over
22 Carr’s claims and dismisses the Complaint. *See, e.g., Klemm v. Astrue*, 543 F.3d 1139,
23 1145 (9th Cir. 2008) (finding the court did not have subject matter jurisdiction when a
24 complaint’s allegations were “completely unsupported by facts” and thus “wholly
25 insubstantial”).

26 Although the Court doubts that amendment would cure the foregoing issues,
27 federal courts, as a matter of policy, favor granting leave to amend “with extreme
28 liberality.” *See Ante v. Office Depot Bus. Servs.*, 641 F. Supp 2d 906, 908 (N.D. Cal.

1 June 15, 2009) (“In the absence of . . . undue delay, bad faith, or dilatory motive on
 2 the part of the movant, repeated failures to cure deficiencies by amendments
 3 previously allowed, undue prejudice to the opposing party by virtue of allowance of
 4 the amendment, etc.—the leave sought should . . . be freely given.” (quoting *Foman v.*
 5 *Davis*, 371 U.S. 178, 182 (1962)). Thus, out of an abundance of caution, the Court
 6 grants Carr leave to file an amended complaint to cure the deficiencies discussed
 7 herein.³

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20 ³ For Carr’s benefit, the Court notes that, even if Carr can surmount the jurisdictional hurdles
 21 described herein, it appears his Complaint has defects that would provide additional grounds for
 22 dismissal pursuant to Rule 12(b)(6). In particular, and without making a substantive finding on the
 23 issue, it appears that none of the federal or California statutes Carr cites as the basis for his causes of
 24 action provides a private right of action. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)
 25 (18 U.S.C. §241); *Sparks v. Disney*, No. 2:20-cv-06556-JWH (JEMx), 2021 WL 8693517, at *2
 26 (C.D. Cal. Jan. 11, 2021) (18 U.S.C. § 2261A); *Adams v. Speedy Recovery Inc.*, No. 2:23-cv-00251-
 27 GMN-BNW, 2023 WL 3182666, at *2 (D. Nev. Apr. 28, 2023) (10 U.S.C. § 921); *Biro v. Keyes*,
 28 No. 2:21-cv-06835-JGB (MAAx), 2022 WL 2102898, at *19 (C.D. Cal. Feb. 23, 2022) (Cal. Penal
 Code § 182); *Deville v. Specialized Loan Servicing, LLC*, No. 2:20-cv-05576-JGB (Ex), 2020 WL
 13267725, at *4 (C.D. Cal Sep. 9, 2020) (Cal. Penal Code § 487). If Carr bases his amended claims
 on statutes for which there is no private right of action, those claims will be subject to dismissal with
 prejudice under Rule 12(b)(6). See *Biro*, 2022 WL 2102898, at *22 (dismissing California Penal
 Code claims with prejudice where alleged statutes provided no private right of action).

1 **V. CONCLUSION**

2 For the reasons discussed above, the Court **GRANTS** Defendant's Motion.
3 (ECF No. 14). The Court **DISMISSES** Carr's Complaint pursuant to Rule 12(b)(1)
4 for lack of subject matter jurisdiction and **GRANTS** Carr **LEAVE TO AMEND**. Any
5 amended complaint must be filed no later than **August 28, 2023**. Should Carr fail to
6 amend his complaint by this date, the dismissal herein shall convert to a dismissal
7 with prejudice.

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9 **IT IS SO ORDERED.**

10
11 July 27, 2023

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15 **OTIS D. WRIGHT, II**
16 **UNITED STATES DISTRICT JUDGE**
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